BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PAUL F. ELDER Claimant VS. **GOODYEAR TIRE & RUBBER COMPANY** Respondent AND **TRAVELERS INSURANCE COMPANY** Insurance Carrier	))))))))))	Docket No. 133,251

ORDER

ON the 3rd day of March, 1994, the application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge James R. Ward, dated January 21, 1994, came on for oral argument in person.

APPEARANCES

Claimant appeared by and through his attorney, Jan Fisher of Topeka, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Brent C. Owen of Topeka, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the Award of the Administrative Law Judge, dated January 21, 1994, is hereby adopted by the Appeals Board.

STIPULATIONS

The stipulations are herein adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge dated January 21, 1994.

ISSUES

The only issue that has been framed for the Appeals Board to review in this case is the nature and extent of claimant's disability. Consequently, the Appeals Board adopts herein the findings made by the Administrative Law Judge regarding all other issues.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record and the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

The Administrative Law Judge found the claimant to be permanently and totally disabled as a result of his work-related accidental injuries pursuant to K.S.A. 1987 Supp. 44-510c(a)(2). The respondent has requested the Appeals Board to review this Award alleging that the more credible evidence establishes that the claimant has suffered a permanent partial work disability as provided by K.S.A. 1987 Supp. 44-510e(a). Permanent total disability exists when a work-related accidental injury has rendered the claimant completely and permanently incapable of engaging in any type of substantial gainful employment. Grounds v. Triple J Construction Co., 4 Kan. App. 2d 325, 330, 606 P.2d 484, rev. denied 227 Kan. 927 (1980). Permanent partial general work disability is the extent, expressed as a percentage, to which the claimant's ability to perform work in the open labor market and his ability to earn comparable wages have been reduced, taking into consideration the claimant's education, training, experience and capacity for rehabilitation. Hughes v. Inland Container Corp., 247 Kan. 407, 414, 799 P.2d 1011 (1990).

The Appeals Board has the authority to increase or decrease an award of compensation of an Administrative Law Judge upon review. K.S.A. 44-551(b)(1). As the trier of fact, the Appeals Board is free to consider all of the evidence and decide for itself, the appropriate percentage of disability. See Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

There is no question that the facts in the instant case firmly establish that the claimant has a permanent disability as a result of his accidental work-connected injury. The question is whether the claimant has met his burden of proof by a preponderance of the credible evidence establishing that the claimant, on account of his injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. K.S.A. 44-508(g).

Whether the claimant is permanently totally disabled is a question of fact. If the claimant's injuries would have resulted in the loss of both eyes, hands, arms, feet or legs, or any combination thereof, such injuries, in the absence of proof to the contrary, would constitute permanent total disability. K.S.A. 44-510c(a)(2). Here the claimant has not lost both feet but has suffered a permanent partial loss of use of both feet. Therefore, the injury suffered by the claimant does not raise the statutory presumption of permanent total disability pursuant to K.S.A. 44-510(a)(2). The trier of fact is then left with the responsibility of determining the existence, extent and duration of claimant's disability. Boyd v. Yellow Freight Systems, Inc., 214 Kan. 797, 803, 522 P.2d 395 (1974). The loss of or partial loss of use of one foot is a scheduled injury under K.S.A. 44-510d(a)(15). However, the Kansas Supreme Court in a early decision held that when a workman has suffered an injury to both feet, compensation should not be computed as a scheduled injury, but should be computed under the provisions of the permanent total, temporary total or permanent partial disability statutes. See Honn v. Elliott, 132 Kan. 454, 458, 295 Pac. 719 (1931).

Claimant was a long-term employee of the respondent, having worked almost thirty-three (33) years, when he finally took disability retirement in November of 1992. At the time of the claimant's evidentiary deposition taken on June 28, 1993, he was fifty-one (51) years of age. He was a high-school graduate with no other post-high school vocational training or education. Since the age of thirty (30) he has had problems with both of his feet requiring him to wear arch supports and high shoes. The claimant's foot problems finally culminated in an onset of severe pain in his right foot to the extent that he could not bear his weight while he was working for the respondent on November 28, 1988.

Claimant was first seen by Robert R. Payne, M.D., an orthopedic surgeon with Orthopedic Clinic of Topeka, P.A., for treatment of his right foot on the date of his accident of November 28, 1988. Dr. Payne's impression from his examination was that the claimant had severely pronated feet with traumatic arthritis. At this time, the right foot was the only foot that was symptomatic. Claimant was taken off work, placed on crutches and prescribed an anti-inflammatory medication. He was followed by Dr. Payne until January 20, 1989, when he was referred to Kenneth Gimple, M.D., another orthopedic surgeon in the same medical group.

Dr. Gimple prescribed a solid ankle brace for the claimant's right ankle and returned him to regular work on March 13, 1989. After returning to work, the left ankle also became symptomatic and a brace was ordered for the left ankle. Even though the claimant was able to work with discomfort and pain, he finally agreed to surgery on August 15, 1989. He was taken off work but was returned to light-duty work at the insistence of the employer until his surgery. As a result of the claimant's severe talonavicular degenerative arthritis of both feet, he was having increasing pain symptoms and decreasing ability to walk and stand. In an effort to improve the condition of claimant's feet, Dr. Gimple on September 25, 1989, performed a bilateral mid-foot osteotomy and fusion. Internal fixation was accomplished using large screws in conjunction with local bone grafts. Dr. Gimple supervised the claimant's physical rehabilitation which consisted of exercising on a stationary bicycle and physical therapy.

The claimant's right foot made very good progress but his left foot continued to be symptomatic. Finally, Dr. Gimple diagnosed the left foot as a non-union mid-foot osteotomy and performed an autogenous iliac bone graft to repair the non-union on July 16, 1990. Again, physical rehabilitation was prescribed in the form of vigorous biking and walking. On February 5, 1991, the claimant was released for work with restrictions of no prolonged walking and no lifting over thirty (30) pounds.

Because of continuing discomfort in his feet, claimant was again taken off work on March 28, 1991. Treatment in the form of physical therapy was provided with the addition of an external electrical stimulator device which was prescribed to be used for ten (10) hours per day. This treatment helped the left foot but the right foot then became more symptomatic. The electrical stimulator was then used on the right foot and steroid injections were also tried. Dr. Gimple eventually released claimant to return to work with restrictions to perform work activities that did not include a great deal of vigorous walking and performing a job which the claimant could sit and rest for short periods frequently during the day.

The claimant eventually returned to work for the respondent performing a temporary office job which required him to sit for approximately six (6) hours per day and stand for approximately two (2) hours per day. He addressed envelopes and did miscellaneous filing

duties. This job was only temporary and lasted from February 1992 to May 1992. Claimant was able to perform the job duties satisfactorily. However, his feet did bother him toward the end of this temporary job.

The claimant took disability retirement from the respondent in November 1992 and is also currently receiving Social Security disability benefits. Since retirement the evidentiary record does not indicate that the claimant has sought employment. The only permanent work restriction that Dr. Gimple placed on the claimant was that he should be employed in a job that does not involve a great deal of walking or standing. Claimant was finally released from medical treatment by Dr. Gimple on December 7, 1992. He indicated that he simply did not have anything else to offer the claimant. With regard to permanent functional impairment, Dr. Gimple, in consultation with the American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition, opined that the claimant has a twenty percent (20%) physical impairment to each of the lower extremities and using the combined value charts of the AMA Guides converts this to a thirty-six percent (36%) impairment of both lower extremities. The combined value chart of the AMA Guides is provided to convert separate whole person impairment ratings to one whole person rating. Dr. Gimple, when he combined the two twenty percent (20%) impairment ratings of each lower extremity using the combined value chart, erred when he concluded that this resulted in a thirty-six percent (36%) impairment of both lower extremities. Dr. Gimple had to first convert the twenty percent (20%) impairment of each lower extremity to the whole person using Table 46 of the AMA Guides before utilizing the combined value chart. The twenty percent (20%) impairment converts to an eight percent (8%) whole person impairment. The combined value chart then converts each of the eight percent (8%) lower extremity whole person impairments to a single fifteen percent (15%) impairment of the whole person.

Other than the claimant's problem with his feet, his general health is very good. In fact, until he had his first surgery on his feet in September 1989, he had not had a previous operation. Claimant currently is able to drive a car, help do work around the house and the farm, ride an exercise bicycle, be on his feet anywhere from three to four (3-4) hours per day with breaks, and he can walk up to forty-five (45) minutes before needing a rest. Additionally, he demonstrated that he could perform an office-type job when he was employed by the respondent for eight (8) hours per day. He further testified that he probably could handle a sedentary job such as using a telephone if he could sit all day. Also, he is able to fish and he drives into town several times per week to have coffee with his friends. In order for the claimant to accomplish these activities, he is required to wear solid ankle braces. He does continue to have pain and discomfort in his feet, some days more than other days. When his feet become symptomatic, he sits down and elevates them to relieve him of the pain. Even with this pain and discomfort, he has not required medical treatment since he was released from Dr. Gimple on December 7, 1992. He requires no pain medication in the performance of his daily activities.

At the request of claimant's attorney, Michael J. Dreiling, Director of Menninger Return to Work Center in Kansas City, Kansas, evaluated the claimant for the purpose of formulating an opinion concerning claimant's work disability. Mr. Dreiling personally interviewed the claimant, obtaining information from him concerning his education, training and past work experience. He reviewed various medical records involving claimant's medical treatment, including Dr. Gimple's permanent work restrictions of no work involving a great deal of walking and standing.

It was Mr. Dreiling's opinion that the claimant's medical restrictions which limit his prolonged standing and walking have significantly affected his vocational opportunities. Prior to his work-related injury, the claimant performed very physically demanding jobs that required him to be on his feet constantly. Now, his vocational profile is more consistent to work of the sedentary nature. Mr. Dreiling opined that the claimant's ability to perform work in the open labor market has been reduced by eighty-eight percent (88%). Examples of occupations in this remaining twelve percent (12%) would include small assembly, cashiering, and selected security monitoring.

Concerning claimant's ability to earn a comparable wage, Mr. Dreiling compared a pre-injury hourly wage without fringe benefits of $17.00 per hour to a post-injury hourly wage of $5.50 per hour. He concluded that the claimant's ability to earn comparable wages in the open labor market had been reduced by sixty-eight percent (68%).

What is "substantial gainful employment" as set forth in the Kansas Workers Compensation Act? K.S.A. 44-510c(a)(2). In the recent case of Wardlow v. ANR Freight Systems, Inc., 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993), the Court of Appeals of Kansas held that the trial court's finding that the claimant is permanently and totally disabled because he is essentially and realistically unemployable, is compatible with legislative intent. The claimant in the Wardlow case was a sixty-three year old workman who suffered a fractured lower back, pelvis, right hip, right thigh and a probable fracture to his right ankle in an industrial accident. He underwent three surgeries and spent several months in a nursing home convalescing from his severe injuries. The trial court found that the existence of evidence that the claimant who had only a history of unskilled physical labor, could perform part-time sedentary work, did not necessarily establish that he was capable of engaging in any type of substantial gainful employment.

Considering the whole record, the Appeals Board finds that the evidence in the present case does not meet the standard of permanent total disability as the claimant has the ability to engage in substantial gainful employment. The claimant is capable of transporting himself to and from sedentary jobs that he has the ability to perform and are available for him to perform in the open labor market earning approximately $5.50 per hour. There is no question that the claimant has suffered a severe work disability as established by the uncontradicted vocational expert testimony. Accordingly, the Appeals Board finds that the claimant's ability to perform work in the open labor market has been reduced by eighty-eight percent (88%). In addition, with respect to the claimant's ability to earn comparable wages, the Appeals Board, following the case of Slack v. Thies Development Corporation, 11 Kan. App. 2d 204, 718 P.2d 310, rev. denied 239 Kan. 694 (1986), finds that the claimant's pre-injury stipulated weekly wage of $959.01 should be compared to a post-injury weekly wage of $220.00 for a reduction of seventy-seven percent (77%). Pursuant to the Hughes formula giving equal weight to each of these factors, the claimant is entitled to an eighty-two percent and one-half (82.5%) permanent partial general disability award based on work disability. Hughes v. Inland Container Corp., 247 Kan. 407, 422, 799 P.2d 1011 (1990).

As nature and extent of claimant's disability was the only issue presented for review by the Appeals Board, all other findings made by Administrative Law Judge James R. Ward in his Award dated January 21, 1994, are incorporated herein and made a part hereof as if specifically set forth in this Order.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge James R. Ward, dated January 21, 1994, is hereby modified and an award is entered as follows:

AN AWARD OF COMPENSATION IS HEREBY ENTERED IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Paul F. Elder, and against the respondent, Goodyear Tire & Rubber Company, and its insurance carrier, Travelers Insurance Company, for an accidental injury sustained on November 28, 1988, and based upon an average weekly wage of $959.01.

Claimant is entitled to 169.14 weeks of temporary total disability at the rate of $263.00 per week or $44,483.82 followed by the payment of $263.00 per week for 211 weeks and one final payment in the amount of $23.18 or $55,516.18, for an eighty-two and one-half percent (82.5%) permanent partial general disability, making a total award of $100,000.00.

As of July 22, 1994, there is due and owing the claimant 169.14 weeks of temporary total disability compensation at $263.00 per week in the sum of $44,483.82 plus 125.57 weeks permanent partial disability compensation at $263.00 per week in the sum of $33,024.91 for a total due and owing of $77,508.73 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of $22,491.27 shall be paid at $263.00 per week until fully paid or until further order of the Director of Kansas Workers Compensation.

IT IS SO ORDERED.

Dated this _____ day of July, 1994.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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